Supreme Court, U.S.
FILED
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No.

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**In the**

**SUPREME COURT OF THE UNITED STATES**

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**Kathryn C. Hagen,**
**Petitioner**

**v.**

**Jim Clark Motors, Inc.**
**Respondent**

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***On Petition for Writ of Certiorari***
***to the***
***Kansas Supreme Court***

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# PETITION FOR WRIT OF CERTIORARI

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**Introductory Statement:**

Petitioner Kathryn Hagen filed an action in State District Court in Douglas County Kansas against a car dealership, Jim Clark Motors, Inc. alleging violations of Kansas Consumer Protection provisions. Scott Bloch with the firm of Stevens & Brand L.L.P. entered an appearance for Jim Clark Motors, Inc. Two partners in the Stevens & Brand firm had been counsel for Mrs. Hagen in numerous personal and business matters for a period of seventeen years. She requested that they withdraw due to conflict of interests. Mr. Bloch and the firm refused to withdraw. Hagen filed a Motion for Disqualification. Mr. Bloch filed a response which revealed confidential information pertaining to matters in which the firm had counseled Hagen. The firm was also holding her Original Will. The District Court declined to order disqualification but certified the matter as appropriate for an interlocutory appeal. Neither the Kansas Court of Appeals or the Kansas Supreme Court would agree to hear the matter on an interlocutory basis. Hagen refused to prosecute her case against her own lawyers. The case was finally dismissed for failure to prosecute at which time Hagen again appealed the disqualification issue to the Kansas Court of Appeals. It dismissed her appeal as not being from a "final" order. The Kansas Supreme Court again refused review. She now seeks from this Court the only appellate review available to her.

**Questions Presented for Review:**

Issue 1: Is the Attorney/Client privilege constitutionally protected in a civil proceeding?

Issue 2: Does a lawyer who opposes his client in a civil proceeding create a "defacto" denial of due process and equal protection?"

**List of Parties to Proceeding:**

Kathryn C. Hagen,
Plaintiff /Petitioner

Jim Clark Motors, Inc.
Defendant/Respondent

Petitioner is not aware of any parent company or publicly held corporation owning ten percent or more of stock in Jim Clark Motors, Inc.

Collateral Parties include members of the firm of Stevens & Brand L.L.P. located in Lawrence, Kansas.
Specific members include Webster Golden and Diane Simpson. Scott Bloch left the firm and is now with the Justice Department in Washington, D.C.

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**Opinions Below:**

The Memorandum Decision issued by the State District Court which denied Hagen's Motion to Disqualify was filed August 9, 2001 and is included herein at page **1a.** The Order certifying that decision as appropriate for an interlocutory appeal was filed September 18, 2001 and is included herein at page**7a.** The Kansas Court of Appeals order denying interlocutory review was filed October 11, 2001 and is included herein at page **9a.** The Kansas Supreme Court's denial of review of the Court of Appeals refusal to hear the interlocutory appeal was filed on March 19, 2002 and is included herein at page **10a.** The District Court Order dismissing Hagen's suit for failure to prosecute was filed August 28, 2003 and is included herein at page **11a.** The Kansas Court of Appeals Order dismissing Hagen's appeal for lack of "finality", after dismissal of her state suit, was filed December 15, 2003 and is included herein at page **12a** The Kansas Supreme Court's Order refusing review of the Court of Appeals' dismissal of Hagen's appeal was filed **March 30, 2004** and is included herein at page **13a**.

**Jurisdictional Basis:**

Appellate Jurisdiction in the United States Supreme Court is conferred by virtue of 28 U.S.C. section 2104. This is a review of a final decision of the Kansas Supreme Court.

**Applicable Kansas Supreme Court Rules relating to the Discipline of Attorneys:**

**Rule 1.3 Diligence: A Lawyer shall act with reasonable diligence and promptness in representing a client.**

**Comment:** A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2 A lawyer's workload should be controlled so that each matter can be handled adequately.

. . .

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. **If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so**. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an

appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

**Rule 1.6 Confidentiality of Information :**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or
(2) to comply with requirements of law or orders of any tribunal; or
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Kansas Comment:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper

representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

**A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.** The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

**The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics.** The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information excepts s authorized or required by the Rules of Professional Conduct of other law.

. . .

**Rule 1.7 Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(a) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment:
*Loyalty to a Client*

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures appropriate for the size and type of the firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to

determine whether there are actual or potential conflicts of interests.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists, or having, once been established, is continuing. See Comment to Rule 1.3 and Scope.

. . .

**Rule 1.9 Conflict of Interest: Former Client**

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

**Statement of the Case:**

On March 15, 201 Kathryn Hagen filed an action against Jim Clark Motors, Inc in the Seventh Judicial District,

Douglas County, Kansas alleging violations of Kansas consumer protection statutes and fraud in connection with the purchase of a motor vehicle. Mr. Scott Bloch of the Stevens & Brand L.L.P. law firm, Lawrence, Kansas entered his appearance and answered alleging, among others, an affirmative defense of "fraud". Mr. Bloch never notified Hagen's counsel that members of his firm had a long standing relationship with Hagen. He didn't volunteer that a lawyer in the firm was holding original Wills belonging to Mrs. Hagen and her then deceased husband. Upon finding out about the long standing relationship, Hagen's counsel requested that the firm withdraw from the case, citing conflict of interest. The firm refused. A Motion for Disqualification was filed. Mr. Bloch filed a written response, as a matter of public record which outlined the work done for Hagen by the firm and which contained confidential client information. No effort was made by Bloch to limit the accessibility of the sensitive information from Jim Clark Motors, Inc. or the public generally. While the motion was pending Bloch sent a letter to Hagen's counsel returning the original Wills with a comment that because Hagen was concerned about their representation of Jim Clark Motors they were returning her Wills. The return of the Wills occurred several weeks after Bloch filed his entry of appearance and Answer.

A hearing was held on Hagen's motion on July 13, 2001. At the time of the hearing Hagen requested that the Court hear verbal evidence from her "in camera" related to the general and financial information held by the Stevens & Brand firm. The Court refused. Mr. Bloch brought to court an expandable file folder holding numerous files which he presented to the Court as evidence that "no conflict of interest" existed. The files represented work done for and on behalf of Hagen. The representative for Jim Clark Motors,

Inc. was present at the hearing and the counsel table where Bloch had placed Hagen's files. Hagen's counsel had previously inquired of Mr. Bloch about the nature and extent of the firm's representation of Hagen. He would not provide any information. At the hearing Hagen's counsel asked the Court to allow her to review the files which would be submitted for the Court's review. The Court would not allow Hagen's counsel to see what was in the files.

The Court refused the request for disqualification in an opinion filed August , 2001. Thereafter the District Court certified the matter as appropriate for an interlocutory appeal. The Kansas Court of Appeals refused to consider the interlocutory appeal. Thereafter, the Kansas Supreme Court refused to review the Court of Appeals' denial of the appeal. Thereafter nothing happened in the case at the District Court level until such time as the District court ordered a status conference for August 13, 2003. At that time Hagen made it clear that she could not prosecute her case with Stevens & Brand remaining as counsel because doing so would be construed as acquiescing in the Court's determination that disqualification was not warranted. Thereafter, the District Court sent notice to both parties counsel that she intended to dismiss the case for failure to prosecute. No action was taken by either Hagen or Jim Clark Motors, Inc in response to the District Court's notification. On August 28, 2003 the District Court filed a "Order" dismissing Hagen's case for failure to prosecute and assessed costs against plaintiff Hagen.

Hagen then filed her notice of appeal and docketed the appeal with the Kansas Court of Appeals. She submitted her initial brief on or about November 17, 2003. Thereafter Jim Clark Motors, Inc. instead of responding to Hagen's brief,

simply filed a Motion to Dismiss the appeal contending that the August 28, 2003 Order from which Hagen appeals was a voluntary dismissal and the appeal should be dismissed. Hagen responded to Defendant's motion. The Court of Appeals then entered an Order on December 15, 2003 finding that Hagen's appeal should be dismissed, not because she acquiesced in the dismissal of her case, but rather because the August 28 Order was not "final", with a simple notation that "the dismissal without prejudice was not a final appealable order." Hagen petitioned the Court of Appeals for reconsideration with a suggestion for en banc review arguing that nothing contained in the August 28, 2003 District Court Order indicated that it was "without prejudice"; that K.S.A. 60-241(2)(b) allowed for the district Court's dismissal and that under said provision the dismissal was to be considered an adjudication on the merits; that under K.S.A. 60-241(d) costs are only to be assessed in cases which are considered dismissed with prejudice; and that costs had been assessed against Hagen in the August 28 Order thusly making it "final" for appellate purposes. Hagen also cited *Frederking v. Frederking*, 26 Kan.App. 2d 614, 992 P.2d 1255 (Kan.App. 1999) which opined that "a review of the statutes indicates the legislature contemplated an award of costs to occur directly following a **final order** of the trial court" and because Judge Martin had awarded costs in the August 28 Order that is must be considered "final". Significantly Jim Clark Motors, Inc. did not argue the basis for dismissal relied upon by the appellate court, nor did it ever file a brief. The Court of Appeals denied en banc review or rehearing. Hagen then petitioned the Kansas Supreme Court for review. Her request for review was denied by that Court as well. She has been denied all appellate review of the propriety of her lawyers opposing her.

**Considerations Governing Review:**

The Kansas Supreme Court has sanctioned a departure from the usual course of judicial proceedings such that the supervisory power of this Court is warranted.

**Arguments and Authorities:**

Issue 1: The attorney- client privilege must be constitutionally protected in civil proceedings so that the fundamental fairness of jurisprudence is not abrogated.

Mrs. Hagen had a long term relationship with Web Golden and Diane Simpson with the Stevens & Brand L.L.P. law firm. In fact the District Court made note of that long term relationship in the Memorandum Decision filed in August of 2001 denying disqualification. What Stevens & Brand argued was that Mrs. Hagen was not a "present client" of the firm. That position is clearly at odds with the fact that they were holding the original Will of Mrs. Hagen as well as that of her deceased husband. Would a lawyer agree to hold the Original Will of a person that he contended was not his client? No. In addition, the Comments to the applicable Rules of Professional Conduct belie the position taken by Stevens & Brand. The comments to Rule 1.3, supra clearly indicate that a reasonable person will presume that a lawyer who has been their lawyer for a number of years in a number of matters, continues to be their lawyer unless and until the lawyer makes it clear that an attorney-client relationship no longer exists. Stevens & Brand made no effort at any time to inform Mrs. Hagen that they were abandoning her as a client. In fact, the holding of her Will is clear evidence of the contrary. It is well known that lawyers who write wills for clients will hold those wills and that at the time of the client's

deaths, the executor will generally hire the firm to probate the will. That is a rational and logical position. It is assumed that a firm who has had numerous dealings with a client over the course of a long period of time is in the best position to assist in carrying out the last wishes of that client. Mrs. Hagen was 76 years old at the time that Scott Bloch entered his appearance against her and lodged an accusation of "fraud" against her despite the fact that another partner in the firm was holding her Original Will.

What Stevens & Brand argued and what the Court apparently accepted was that the attorney-client relationship is, in essence, a mere business transaction. If you are not presently "paying" them money, then a "lawyer-client" relationship does not exist. Mr. Bloch said as much in a letter to Hagen's counsel dated May 16, 2001. In the letter he identified himself as "chair of the Douglas County Bar Ethics and Grievance Committee" and outlined elements he contended established the attorney-client relationship, I.E.: "[Hagen]had no current open files; was not having any work done for her; had paid no retainer to keep the firm actively involved on her behalf; and had not consulted the firm in any capacity for over three years." Mrs. Hagen desired to present evidence at the hearing on disqualification "in camera" which would have established that Web Golden had, in fact, helped her in a financial matter within a short period of time prior to Bloch's entry of appearance. Hagen could not have presented the evidence in any other way - because to do so outwardly would have been to waive the privilege sought to be protected. Her request was denied.

A lawyer who opposes their own client violates the confidence that the client has placed in the lawyer and in the system. If a lawyer may decide that no "attorney-client"

relationship "now" exists and then oppose a client, then every lawyer in every situation should advise their clients to convey as little information as possible to the lawyer because at a later time that lawyer may be opposing the client. Every client in every situation should be advised to take their files with them at the end of the representation. No lawyer should maintain any files which could be used against a client in a later proceeding. Information derived by virtue of the relationship -- confidential and sensitive information is great fodder for opposing a person in litigation. Information about their finances, about their business practices and about their families which is not otherwise readily known can provide a great advantage in the context of litigation and discovery. Scott Bloch brought an "armload" of files with him to the disqualification hearing -- and those files were set in front of Mrs. Hagen's opposition, Jim Clark Motors, Inc. Some of the files held sensitive personal information that Hagen's family didn't even know. Bloch had also filed as a matter of public record an extensive response to the disqualification motion outlining the work done for Hagen -- all of which was confidential information which could not have been derived from any other source. He made no effort to protect the information from the public or his client -- Jim Clark Motors, Inc.

The attorney-client privilege has been held to be sacrosanct. It is clear from Supreme Court precedent, the most recent of which is *Mickens V. Taylor*, 535 U.S. 162, 122 S.Ct. 1237 (2002) that an attorney who operates under a conflict of interest in a criminal matter deprives his client of due process and deprives his client of the effective assistance of counsel Sixth Amendment protections necessary for the pursuit of "justice" as opposed to the mere pursuit of "prosecution". The Sixth Amendment doesn't, however,

speak to the deprivation which occurs when a person's lawyer opposes them and utilizes information obtained by virtue of the lawyer-client relationship against them in a civil suit. Is "justice" preserved when such a situation occurs? No. Is faith in the system preserved? No. Is the free exchange of information between a lawyer and client which is necessary for adequate counsel engendered? No.

The attorney client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U.S. 383,389 (1981). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administrations of justice". *Id* at 389. In *Swidler & Berlin v. United States* ,118 S.Ct. 2081 (1998) this Court found that the privilege extends beyond the death of a client. Surely then it must be assumed, that the privilege is far more important and far stronger while the client is alive. If, however, a client may not invoke that privilege to stop her lawyers from using her confidences against her -- in opposition to her in a litigation context, then the privilege really does not exists -- and it certainly does not belong to the client. Is it now necessary for every person who has a long standing diversified relationship with a law firm to keep the firm on retainer in order to protect their confidences from being used against them? The position taken by the Stevens & Brand firm, a position which has been sanctioned by the Kansas Supreme Court through its acquiescence by silence, is that if you aren't presently "paying" your lawyer money -- then no attorney-client relationship exists and that lawyer may oppose you -- regardless of the length or breadth of the relationship. There can be no doubt that such a scenario creates obvious Due Process and Equal Protection problems.

Mrs. Hagen was denied her property -- her lawsuit against Jim Clark Motors, Inc. because her lawyers opposed her. Furthermore, those lawyers were advantaged by their attorney-client relationship with her. They could use a plethora of information against her to advance Jim Clark Motors, Inc. interests in the litigation -- thusly feathering their own nests. Clients are happy to pay fees when they are winning. Potential clients want to hire winning attorneys. They can win through use of information about a client against a client-- or sit by and win when the client is forced to stay prosecution in order to preserve a right to appeal their participation. The problem here is the Kansas Supreme Court wouldn't write an opinion which approved the conduct exhibited by Stevens & Brand or an opinion against that conduct. So, other Kansas lawyers don't know that they can get away with litigating against their clients. From a competitive viewpoint, Stevens & Brand has an advantage over other Kansas lawyers.

Hagen could not have continued to prosecute her claim against Jim Clark Motors, Inc. and still preserve her right to appeal the propriety of the participation of Stevens & Brand.. The Kansas Supreme Court addressed the acquiescence issue in *Yolanda Huet-Vaughn, M.D. v. Kansas State Board of Healing Arts,* 267 Kan. 144, 978 P.2d 896 (1999). The opinion makes it clear that Kansas has a long standing strict approach to the acquiescence issue. Said the Court:

> "Quite early in the history of this court the position was taken that a party who complains of a judgment must be consistent in his conduct with reference to it, and if he recognizes its validity or acts contrary to the assumption that is is erroneous

> . . . he will not be heard to say on appeal that it is erroneous. In applying this rule less liberality of conduct has been permitted to appellants than many other courts of last resort are disposed to allow when dealing with the same subject, but manifestly the case must be determined according to those principles which have long been adopted and followed here. Appellant cites no decision of this court favoring his estimate of his rights, although the general question has been considered many times. (*Id.* at 898-899)

"[A]acquiescence in a [decision] may be implied or express; regardless, it cuts off the right of appellate review as a matter of law." *Layne Christensen Co. et al., v. Zurich Canada et al.*, 30 Kan.App.2d 128, Syllabus by the court, paragraph Nos. 1 and 2, 38 P.3d 757 (2002). If Hagen continued to prosecute the matter with Stevens & Brand opposing her -- she would be denied the right to appeal their participation. By not doing so, she is still denied her right to appeal. She is denied if she does and denied of she doesn't. That has to be a violation of Due Process and Equal Protection. Hagen was not allowed the process necessary to obtain appellate review. She was denied the protection afforded by appellate review which is routinely allowed other litigants.

Issue No. 2: A lawyer who opposes their client in civil litigation creates a "defacto" denial of Due Process and Equal Protection.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S.1 (1991) this Court presented a historical perspective

concerning the meaning of "due process". The bottom line was that "a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law." *Id.* at 6. "[C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." *Id.* at 8 citing *Twining v. New Jersey*, 211 U.S. 78, 101 (1908) Ultimately what was determined to be important was whether the procedure involved was "fundamentally fair". The fairness aspect could be discerned by looking to what was historically found to be "settled usage". Historically citizens have relied upon their lawyers to protect them from the complexities of the law. It is well settled that one's lawyer is one's advocate. It is generally agreed that it is best to invoke the skills of a lawyer in order to protect a citizen's private rights and to guard against the arbitrary action of government. The problem here is that the lawyer is not there to protect their client's rights, but rather, to capitalize on the confidences conveyed by a client. A lawyer cannot represent a person in a number of matters over the course of seventeen years and be holding the Original Will of a 76 year old client, and legitimately argue that that person is "not their client" and/or that the information derived by virtue of the long standing relationship will not be used in litigation against the client. The situation is further exacerbated by the fact that the lawyer involved in this instance is prosecuting a claim for "fraud" against the client -- and demeaning her by publishing confidential personal

information. What client wants to continue to litigate with that scenario? Not one person who reads this would be comfortable with Mrs. Hagen's situation were they the client that Stevens & Brand represented -- and opposed. It is fundamentally unfair to allow Stevens & Brand to continue in the litigation and to distribute the confidential information of clients to others who oppose those clients. The Rules adopted by the Kansas Supreme Court clearly prohibit such conduct. Those Rules, however, have no effect if the Courts will not enforce them.

Of additional import is the fact that Hagen had the burden of proving that Stevens & Brand held information that could be used against her in the civil proceeding, yet she was denied access to that information. The Firm would not provide any information to her counsel prior to the hearing so that the information could be reviewed with Hagen to determine whether what was submitted was all that was available, nor was her counsel allowed to review the information at the hearing. Hagen could not meet the burden of proof demanded of her because Stevens & Brand held the information necessary to meet that burden and would not provide it to her and the court would not order that the information be made available to her.

Furthermore, the information held by the firm, as gleaned from the Court's Memorandum Decision (page 1a) clearly indicates that substantial information was derived by the Firm concerning Mrs. Hagen's business acumen and practices. That information would be most beneficial in the suit against Jim Clark Motors, Inc because it involved a contract dispute. To say that all of the business information obtained by the firm concerning Mrs. Hagen would not be beneficial in

discovery or trial is not realistic. The Kansas Supreme Court opined in *Monroe v. City of Topeka*, 267 Kan. 440 (1999) citing *Koch v. Koch Industries*, 798 F. Supp. 1525, 1536 (D.Kan. 1992) that information acquired by a lawyer from his "former" client is relevant to a conflict of interest argument if that information "reveals the client's pattern of conduct." The pattern of conduct reveals information about the client's intellect and personality in adversarial proceedings.

Again, Mrs. Hagen contends that information concerning her financial affairs was available to Mr. Golden within a short period of time prior to Mr. Bloch's entry of appearance. The Memorandum Decision of the District Court doesn't reflect that contact. A element considered important in the decision relied upon by the District Court, *Barragree et al. v. Tri-County Electric Cooperative, Inc.* 263 Kan. 446, 950 P.2d 1351 (1997) was whether the attorney sought to be disqualified held "financial information " not otherwise available. The financial information is important in determining a person's ability to sustain prosecution and willingness to settle.

WHEREFORE, by reason of the above and foregoing Petitioner Kathryn C. Hagen respectfully prays that this Honorable Court will allow her the only avenue of appeal available and grant certiorari to review the important issues presented.

RESPECTFULLY SUBMITTED:

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Filed August 9th, 2001

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785-832-5323

0C111 *Kathryn C. Hagen v. Jim Clark Motors, Inc.*

**MEMORANDUM DECISION**

On July 13, 2001, the above-referenced matter came before the court on Plaintiff's Motion for Disqualification of Defense Counsel. The plaintiff appeared in person and with her attorney, Patricia Matassarin. The Defendant appeared through its officer, Lewis Brubeck, and its attorney, Scott Bloch.

The plaintiff, Kathryn C. Hagen, seeks to disqualify Scott Bloch, a partner in the Stevens & Brand law firm, hereinafter referred to as "the firm", from representing the defendant, alleging that he has a conflict of interest based on her attorney-client relationship with the firm. Webster L. Golden and Diane W. Simpson, partners in the Stevens & brand firm, have provided legal services to plaintiff.

At the conclusion of the hearing, the court rules that neither Supreme Court Rule 226, Kansas Rules of

Professional Conduct, Rule 1,7 nor Rule 1,9(a) were applicable to the facts before it. Whether defense counsel should be disqualified pursuant to Rule 1.9(b) was taken under advisement in order for the court to conduct an in camera review of the files maintained by the firm relating to Mrs. Hagen to determine whether relevant confidential information was acquired by the firm during its former representation of Mrs. Hagen. Because this factual inquiry necessarily involves disclosure of confidential information, this Memorandum Decision shall be sealed.

In *Barragree v. Tri-County Electric Co-op, Inc.*, 263 Kan. 446,462 (1997) , the Kansas Supreme Court addressed the proof required to prevail on a motion to disqualify pursuant to KRPC 1.9(b).

> "An (sic) MRPC 1.9(b) (now KRPC 1.9(b)) motion to disqualify requires proof that (1) the attorney sought to be disqualified has acquired confidential information during the former attorney-client relationship and (2) the confidential information could be used to the disadvantage of the former client in the current matter. There is no rebuttable presumption that the attorney acquired such information, absent a substantial relationship between the current and former matters.

The Court has previously ruled that there is no substantial relationship between the current and former matters. The burden of proof then is on the plaintiff. *Baragree*, 263 Kan. at 463, citing ABA/BNA Lawyers' Manual on Professional Conduct, p. 51:228.

The court must decide whether any confidential information Mrs. Hagen revealed to Stevens & Brand could

be used to her disadvantage in the pending litigation. In order for confidential information to be used to the disadvantage of the former client under KRPC 1.9(b), such information must be sufficiently relevant to the current matter to cause disadvantage. *Baragree* 263 Kan. at 462. What information did Mrs. Hagen disclose to Stevens & Brand that would justify disqualification?

The court has reviewed the filed maintained by the firm, which included phone messages, correspondence, notes of office conferences, notes of phone conferences and documents prepared by and documents reviewed by Mr. Golden. The court has also reviewed the wills prepared by the firm for Mrs.. Hagen and her husband which had been returned to plaintiff's counsel subsequent to the filing of this action.

From a review of these files, plaintiff's motion and support affidavit, and defendant's memorandum in opposition, the court makes the following findings.:

1. Mrs. Golden first provided services to Mrs. Hagen in 1978. Services included preparing documents for the sale of Sunflower Travel and dissolution of a partnership.

2. Services were next provided in 1981 and involved the sale of Mrs. Hagen's business, Five Star Travel. In the same year, Mr. Golden reviewed documents and advised Mrs. Hagen concerning a rental in England.

3. In 1982, he advised Mrs. Hagen on the filing of a claim in bankruptcy court and the purchase of real estate on Indiana street.

4. In 1982, information was provided to the firm concerning a traffic citation issued to Mr. Hagen, There is no indication that the firm represented Mr. Hagen in this matter. In that same year, services were rendered in connection with an overpayment of insurance benefits and the sale of stock in Atchison Travel.

5. In 1985, Mr. Golden assisted Mrs. Hagen in negotiations with the Internal Revenue Service. In the course of representing Mrs. Hagen in this matter, he obtained financial information from tax year 1982. He also incorporated her new business, Hagen Tours, Inc.

6. In 1986 Mrs. Hagen provided very general financial information to Mr. Golden for use in connection with a separate maintenance. There is no indication that any action was filed.

7. Wills were prepared for Mrs. Hagen and her husband the following year. Very general information was provided to the firm concerning the then assets of Mr. and Mrs. Hagen.

8. Finally, in 1989, Mr. Golden assisted Mrs. Hagen in the sale of her stock in Adventure Travel, a business about which she had sought his advice from time to time since 1984.

9. Mrs. Hagen sought no further advice from the firm until 1997 when she consulted with Ms. Simpson concerning long term care and VA benefits. Ms. Simpson met with Mrs. Hagen, obtained information from Jayhawk Legal Services and, on October 30, 1997 conveyed that information to Mrs. Hagen by telephone.

10. As evidenced by billing statements and the files, the firm has provided no legal services to Mrs. Hagen since October 30, 1997; however, on December 15, 1998, Patricia Matassarin, Mrs. Hagen's daughter called Ms. Simpson regarding long term care.

It has been twelve (12) years since Mrs. Hagen regularly consulted with Mr. Golden. In the eleven (11) years preceding, Mr. Golden obtained knowledge of Mrs. Hagen's business affairs and financial affairs only as relating to a specific business transaction. Mr. Golden obtained an overall view of the Hagen's financial circumstances in 1982 when he negotiated with the IRS on their behalf. The financial information provided in connection with the preparation of wills was general in nature.

Stevens & Brand has no current financial information concerning Mrs. Hagen. Not only is the information possessed by the firm out of date, but the type of information possessed by the firm is not relevant to her claim against Jim, Clark Motors, Inc.

The court concludes that no relevant confidential information was acquired by the firm during its former representation of Mrs. Hagen. Stevens & Brand doe not possess confidential information that could be used to the disadvantage of Mrs. Hagen in the current matter.

Plaintiff's motion to Disqualify is denied.

This Memorandum Decision constitutes a Journal Entry and is effective this 9th day of August, 2001.

s/_____
Paula B. Martin, District Court Judge

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
Seventh Judicial District

KATHRYN C. HAGEN,

Plaintiff,

v.

Case No. 01V111
Div. No. 5

Jim Clark Motors, Inc.

Defendant.

**ORDER CERTIFYING APPEAL PURSUANT TO K.S.A. 60-2102(B)**

The plaintiff has filed a "Motion for Amendment of August 9, 2001 Memorandum Decision to Include K.S.A. 60-2101(b) Certification" and a "Motion for Abatement of Action Pending Appeal". The defendant has responded by filing a Memorandum in Opposition to Plaintiff's Motion to Stay Interlocutory Appeal. Neither party has requested oral argument.

The Court finds that plaintiff's motions should be granted, finding specifically that the Memorandum Decision of August 9, 2001, denying plaintiff's Motion to Disqualify Defendant's Counsel involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The court further finds that the proceedings in the District Court shall be stayed pending application for appeal.

IT IS SO ORDERED.

S/_____
Paula B. Martin
District Judge.

IN THE COURT OF APPEALS

OF THE STATE O KANSAS

Patricia J. Matassarin
2810 whisper Fawn
San Antonio Tx 78230

Case No. 01-87812-A

Kathryn C. Hagen, Appellant,
v.
Jim Clark Motors, Inc., Appellee

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR INTERLOCUTORY APPEAL BY KATHRYN HAGEN.

PETITION FOR INTERLOCUTORY APPEAL IS DENIED.

Date: 10/11/2001

Carol G. Green
Clerk

# IN THE SUPREME COURT

# OF THE STATE OF KANSAS

Patricia J. Matassarin
2810 Whisper Fawn
San Antonio Tx 78230

Case No. 01-87812-A

Kathryn C. Hagen, Appellant
v.
Jim Clark Motors, Inc., Appellee

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY KATHRYN C. HAGEN.

CONSIDERED BY THE COURT AND DENIED.
RESPONSE NOTED.

Dates: 03/19/2002

Carol G. Green
Clerk

Filed August 28, 2003

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
Seventh Judicial District - Division No. 5

**ORDER**

NOW ON THIS 27th day of August, 2003, the Court finds that on August 3, 2003, counsel in the following case was notified that said case would be dismissed for lack of prosecution on August 25, 2003, unless cause was shown for not doing so.

THIS COURT FURTHER FINDS that more than ten days have elapsed since the giving of such notice, that no action has been taken or requested, that no appearance was made at the call of the docket, nor was cause shown for not dismissing these cases.

01C111 Kathryn Hagen v. Jim Clark Motors, Inc.
. . . . . Matassarin/Finkeldei

The above case is dismissed for lack of prosecution at plaintiff's costs.

IT IS SO ORDERED.

S/_____
Paula B. Martin
District Court Judge

cc: Counsel of Record

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

Patricia J. Matassarin
2810 Whisper Fawn
San Antonio, Tx 78230

CASE NO. 03-91299-A

Kathryn C. Hagen Appellant,
v.
Jim Clark Motors, Inc. Appellee.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR INVOLUNTARY DISMISSAL OF APPEAL BY APPELLEE, JIM CLARK MOTORS.

MOTION GRANTED. THE DISMISSAL WITHOUT PREJUDICE WAS NOT A FINAL, APPEALABLE ORDER. RESPONSE NOTED.

Date: 12/15/2003

Carol G. Green
Clerk

# IN THE SUPREME COURT
# OF THE STATE OF KANSAS

Patricia J Matassarin
2810 Whisper Fawn
San Antonio Tx 78230

Case No. 03-91299-A

Kathryn C. Hagen, Appellant,
v.
Jim Clark Motors, Inc., Appellee.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY KATHRYN C. HAGEN.

CONSIDERED BY THE COURT AND DENIED.

Date: 03/30/2004

Carol G. Green
Clerk